

SJ 19 Public Comments

2019-2020 Law and Justice Interim Committee

June 28, 2019

Weiss, Rachel

From: Jana Staton <jstaton@montana.com>
Sent: Wednesday, June 26, 2019 8:57 AM
To: Weiss, Rachel
Subject: Information for LIC Meeting on SJ19
Attachments: Supreme Court- Frightheningly High SO crimes.pdf

RE: SJ 19: Study sex and violent offender registries

Rachel: I'm attaching a recent law article for the Committee that outlines the erroneous history of the belief that recidivism for anyone convicted of a sex offense is "frightheningly high." Before the Committee can rationally review the rationale for and effectiveness of the Sex Offender Registry, they will need to understand the false information on which it has been based and which still supports public policy.

I plan to come for the hearing this Friday and make public comment in support of SJ 19. I'll bring a copy of the article with me but because of the length, it would be better to have a digital copy for each member if this can be considered my submission.

Ellman, Ira Mark and Ellman, Tara, 'Frighthening and High': The Frighthening Stoppiness of the High Court's Sex Crime Statistics (June 8, 2015). Available at SSRN: <http://ssrn.com/abstract=2616429>

This brief essay reveals that the sources relied upon by the Supreme Court in Smith v. Doe, a heavily cited constitutional decision on sex offender registries, in fact provide no support at all for the facts about sex offender re-offense rates that the Court treats as central to its constitutional conclusions. This misreading of the social science was abetted in part by the Solicitor General's misrepresentations in the amicus brief it filed in this case. The false "facts" stated in the opinion have since been relied upon repeatedly by other courts in their own constitutional decisions, thus infecting an entire field of law as well as policy making by legislative bodies. Recent decisions by the Pennsylvania and California supreme courts establish principles that would support major judicial reforms of sex offender registries, if they were applied to the actual facts.

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“Frightening and High”:

The Frightening Sloppiness of the High Court’s Sex Crime Statistics

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ABSTRACT

This brief essay reveals that the sources relied upon by the Supreme Court in Smith v. Doe, a heavily cited constitutional decision on sex offender registries, in fact provide no support at all for the facts about sex offender re-offense rates that the Court treats as central to its constitutional conclusions. This misreading of the social science was abetted in part by the Solicitor General’s misrepresentations in the amicus brief it filed in this case. The false “facts” stated in the opinion have since been relied upon repeatedly by other courts in their own constitutional decisions, thus infecting an entire field of law as well as policy making by legislative bodies. Recent decisions by the Pennsylvania and California supreme courts establish principles that would support major judicial reforms of sex offender registries, if they were applied to the actual facts.

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It isn't what we don't know that gives us trouble, it's what we know that ain't so.
Will Rogers¹

In *McKune v. Lile*, 536 U.S. 24, 33 (2002), the Supreme Court reversed two lower courts in rejecting, 5-4, Robert Lile's claim that Kansas violated his 5th Amendment rights by punishing him for refusing to complete a form detailing all his prior sexual activities, including any that might constitute an uncharged criminal offense for which he could then be prosecuted. The form was part of a prison therapy program that employed a polygraph examination to verify the accuracy and completeness of the sexual history that program participants were required to reveal. Lile had earned placement in a low-security prison unit, but the automatic punishment imposed on him for declining to complete this form included permanent transfer to a high security unit where he would live among the most dangerous inmates, with an accompanying loss of significant prison privileges, including the right to earn the minimum wage for his prison work and send his earnings to his family.

In justifying its conclusion, Justice Kennedy, writing for the four-person plurality, wrote that the recidivism rate "of untreated offenders has been estimated to be as high as 80%." The treatment program, Justice Kennedy explained, "gives inmates a basis to understand why they are being punished and to identify the traits that cause such a frightening and high risk of recidivism." The following year in *Smith v. Doe*, 538 U.S. 84 (2003) the Court upheld Alaska's application, to those convicted before its enactment, of a law identifying all sex offenders on a public registry. It reasoned that the *ex post facto* clause was not violated because registration is not punishment, but merely a civil measure reasonably designed to protect public safety. Now writing for a majority, Justice Kennedy's *Smith* opinion relied on this earlier language in *McKune*:

Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U. S. 24, 34 (2002)....

The idea that those convicted of a crime involving sex (more on the scope of the term "sex offender" later) are dangerous, and re-offend at a particularly high rate, is a commonly offered justification for the increasingly harsh set of post-release collateral consequences imposed on them, nearly all triggered by their inclusion in sex offender registries. Registrants may be subject to residency restrictions that can be severe enough to exclude them from entire cities and prevent them from living with their families.² Separate "presence restrictions" bar registrants from using public libraries or

1. Will Rogers. BrainyQuote.com, Xplore Inc, 2015.
<http://www.brainyquote.com/quotes/quotes/w/willrogers385286.html>, accessed June 4, 2015.

2. See the data described in *In re Taylor*, 60 Cal. 4th 1019, 343 P.3d 867, 184 Cal. Rptr. 3d 682 (2015). Russell Banks wrote a novel, *Lost Memory of Skin*, based on the camp of sex offenders who lived under the Julia

enjoying public parks with their families in some cities.³ Their registration formally excludes them from many jobs,⁴ and as a practical matter keeps them from many more. The registration requirement typically extends for decades, and in some states, such as California, for life, with no path off the registry for most registrants. Challenges to the registration requirement, and the consequences that flow from it, are usually turned back by courts and politicians who often quote Justice Kennedy's dramatic statement that the recidivism rate for sex offenders is "frightening and high". A Lexis search for legal materials containing that phrase returns 91 judicial opinions, as well as briefs in 101 cases. When that much turns on a single assertion, it is important to know whether it's right—whether those convicted of sex offenses indeed re-offend at an 80% rate that is "frightening and high", and much greater than the rate for other offenders.

McKune provides a single citation to support its statement that "that the recidivism rate of untreated offenders has been estimated to be as high as 80%": the U.S. Dept. of Justice, Nat. Institute of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* xiii (1988). Justice Kennedy likely found that reference in the amicus brief supporting Kansas filed by the Solicitor General, then Ted Olson, as the SG's brief also cites this "Practitioner's Guide" for the claim that sex offenders have this astonishingly high recidivism rate. This Practitioner's Guide⁵ itself provides but one source for the claim, an article published in 1986 in *Psychology Today*, a mass market magazine aimed at a lay audience.⁶ That article has this sentence: "Most untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80% do." The sentence, however, is a bare assertion; the article contains no supporting reference for it. Nor does its author appear to have the scientific credentials that would qualify him to testify at trial as an expert on recidivism.⁷ He is a counselor, not an

Little Causeway in Miami because residency restrictions left them no other choices. See Charles McGrath, *A Novelist Bypasses the Middle to Seek Out the Margins*, *New York Times*, October 14, 2011.

3. See, e.g., Amy Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 Ohio St.L.J. 1 (2014).

4. See, e.g., Matt Mellema, *Not Wanted: Sex Offenders*, *Slate Magazine*, August 14, 2014, at <http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/several_states_ban_people_in_the_sex_offender_registry_from_a_bizarre_list.html>.

5. While the Practitioner's Guide is a publication of the Justice Department, the Preface notes that its contents present the views "of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice", a distinction lost to readers of the Court's opinion.

6. Freeman-Longo, R., & Wall, R. (1986). *Changing a lifetime of sexual crime*. *Psychology Today*. 20:58-62. Freeman-Longo is the author described in the rest of this paragraph. Wall, the second author, is identified in the article as a therapist in treatment program Freeman-Longo directed; no further information about him came up in a Google search.

7. The modern understanding of the relevant rule, Federal Rules of Evidence 702, is explained in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and the cases following upon it. The *Psychology Today* article does not indicate the author's training, but a Google search found that his only professional degree is a Master of Rehabilitation Counseling, and found no academic or research appointments at any institution. A Google Scholar search found one article in a peer-reviewed journal with his name: he is the second author on a 1982 publication, *Undetected Recidivism among Rapists and Child Molesters*, 28 *Crime and Delinquency* 450. That

academic, and the cited article is not about recidivism statistics. It's about a counseling program for sex offenders he then ran in an Oregon prison. His unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with his equally unsupported assertion about the lower recidivism rate for those who complete his program.

So it seems that while Justice Kennedy's *McKune* opinion justifies pressuring prisoners to incriminate themselves as a necessary requirement of a prison counseling program thought critical to reducing their high re-offense rate, the Court's evidence for both the high re-offense rate, and the counseling program's effectiveness in reducing it, was the entirely unsupported assertions of someone with no research expertise who makes his living selling such counseling programs to prisons.⁸

The Solicitor General's brief in *Smith* is itself the likely source of a second influential phrase about sex offenders. The brief frames the question before the Court with this opening statement:

Sex offenders exact a uniquely severe and unrelenting toll on the Nation and its citizens for three basic reasons: "[t]hey are the least likely to be cured"; "[t]hey are the most likely to reoffend"; and "[t]hey prey on the most innocent members of our society." United States Dep't of Justice, Bureau of Justice Statistics (BJS), National Conf. on Sex Offender Registries (National Conf.) 93 (Apr. 1998).

The *Smith* opinion did not quote this language, but others have. It appears in the preamble to Jessica's Law, a California initiative that made the sex offender registry public, and imposed residency restrictions on anyone on it.⁹ That preamble attributes the quoted language to an otherwise unidentified "1998 report

article reported the results of a small convenience sample of men incarcerated for sexual assault in a maximum security Connecticut prison, and men committed to a secured Florida treatment center for sexual offenders. The results of this small sample of high-risk offenders, most of whom already had multiple convictions for rape or child molestation, would not tell one very much about the recidivism rate of sex offenders in general.

8. The Solicitor General was complicit in urging the Court toward this conclusion with the argument that "[t]he absence of ready and reasonable alternatives for reducing recidivism among convicted sexual offenders bolsters the constitutionality of [Kansas's Sexual Abuse Treatment Program]." Amicus Brief of the United States at 24.

9. The statement was in the voter's pamphlet explanation of the law. See *People v. Aguon*, Calif App. D053875, filed Feb. 14, 2009 (unpublished), at 37, 39. It is in the law made changes to various provisions of the California law; the key changes are summarized in *People v. Mosley*, 60 Cal. 4th 1044, 1063-64, 344 P.3d 788, 185 Cal. Rptr. 3d 251 (2015). There is some confusion about the law's actual effect. The residency restrictions have historically been applied to those on parole from a state sex offense, but not to other registrants, but the language is broader and in *Mosley* the California Supreme Court recently declined to decide its scope. In a companion case, the California Supreme Court found the residency restrictions unconstitutional as applied to parolees in San Diego County, *In re Taylor*, 60 Cal. 4th 1019, 343 P.3d 867, 184 Cal. Rptr. 3d 682 (2015). Jessica's Law also requires all registrants to wear GPS devices so that their whereabouts can be continuously monitored by state authorities. The

by the U.S. Department of Justice". The California Supreme Court, among other state high courts, has also quoted the same language and also attributed it to "a report by the United States Department of Justice".¹⁰ Yet the statement is rather odd. What does it mean to say that sex offenders are "the least likely to be cured"? Least likely to be cured of what? Of the inclination to commit sex offenses? In that case, who's more likely to be cured? People who don't have that inclination in the first place? It's hard to imagine any scientist making such an incoherent statement, and looking further into the "Justice Department Report" cited by the SG, and then referenced by others, reveals that none did. The "report" in question is merely a collection of speeches given at a 1998 conference of advocates for sex offender registries. The collection's cover sheet disavows any Justice Department endorsement of its contents.¹¹ The "least likely" phrase is taken from a speech in this collection given by a politician from Plano, Texas who never claimed any scientific basis for it. Indeed, she did not even claim it was true. She said only that it is a statement she likes to make.¹² The Solicitor General's representation of this statement as a Justice Department conclusion about the nature of sex offenders was at best irresponsible.

So what *is* the re-offense rate for those convicted of a sex offense? One cannot calculate it without first defining "re-offense," without specifying the time period to employ, and without

scope of this requirement has not been contested, but at the moment California enforces it against current parolees only.

10. The opinion, in rejecting an offender's claim that he was improperly placed on the registry and made potentially subject to the residency restrictions, explains the residency restrictions as "relatively modern attempts to address, by means short of secure confinement, the persistent problem of recidivism among sex offenders", and then in footnote 10 quotes the initiative language, noting that it "[relies] on a report by the United States Department of Justice". *People v. Mosley*, 60 Cal. 4th 1044, 344 P.3d 788, 185 Cal. Rptr. 3d 251 (2015) The language is also quoted in several laws in Wisconsin and Michigan. See Tamara Rice Lave, *The Iconic Child Molester: What We Believe and Why We Believe It*, at p. 55. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118554.

11. "Contents of this document do not necessarily reflect the views or policies of the Bureau of Justice Statistics or the U.S. Department of Justice." Bureau of Justice Statistics, National Conference on Sex Offender Registries, Proceedings of a BJS/SEARCH conference, April 1998, NCJ-168965, at p. ii.

12. The politician was a Texas state senator named Florence Shapiro. What she actually said, as set forth in the conference proceedings: "Sex offenders are a very unique type of criminal. I like to say they have three very unique characteristics: They are the least likely to be cured; They are the most likely to reoffend; and they prey on the most innocent members of our society." *Id.* at pp. 92-93.

Shapiro was a schoolteacher. When she retired from the Texas State Senate in 2013 she was quoted as saying "her proudest achievement came in 1995 when she introduced a set of bills called Ashley's Laws, which are designed to protect children from sexual predators." *The Dallas Morning News*, January 5, 2013, <http://www.dallasnews.com/news/community-news/collin-county/headlines/20130105-retiring-plano-legislator-plans-to-continue-community-work.ece>. A researcher who asked Shapiro in 2007 for the basis of her "least likely/most likely" statement was promised an answer by her staff, but never received one. Tamara Rice Lave, *The Iconic Child Molester: What We Believe and Why We Believe It*, at p. 55. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118554.

considering whether one needs to distinguish among different groups of offenders said to have committed a “sex offenses”. We will consider these in turn.

Our definition of re-offense depends on whether we want to know the proportion of released offenders who commit a criminal violation of any kind, or just serious crimes, or just sex crimes? If the purpose of the sex offender registry the Court addressed in *Smith* is to aid the police in investigating sex offenses, or warn the public about persons thought likely to commit them, then the relevant rate would seem to be the rate at which those convicted of a sex offense commit another one. That’s quite different than the rate at which they commit any offense that returns them to prison. The California Corrections Department recently reported that of those on the sex offender registry who are returned to prison for a new offense, in 88% of the cases the new offense was a parole violation, which could include things like going to a bar or visiting a friend who’s also an ex-felon. Only 1.8% of those re-incarcerated had committed a new sex offense.¹³

The time period we ask about of course also matters: As one lengthens the follow-up period, one would expect to find more re-offenses. So the most conservative measure would ask whether an offender *ever* commits another sex offense. That kind of study is obviously difficult to do. We can’t measure the proportion who commit a new sex crime over twenty years unless we started the study twenty years ago. But a recent meta-analysis by a leading scholar in the area, Karl Hanson, combines the data from 21 studies that followed up offenders for an average of 8.2 years, and for as long as 31.¹⁴ Nearly 8000 offenders were followed, overall. Combining the data allowed the authors to project expected sex crime re-offense rates for longer periods. Sex offenders are not all the same, and useful (though obviously not perfect) actuarial measures are available to assess their relative risk of re-offense. A well-established one, the Static 99-R,¹⁵ was used by this study to classify offenders into three risk categories. It found that 68% of the *high-risk* offenders committed no new offense 15 years after their release, and 95% of the low risk offenders were offense-free after 15 years.¹⁶ Some context can help

13. Calif. Dept. of Corrections And Rehabilitation, 2013 Outcome Evaluation Report (January 2014), (http://www.cdcr.ca.gov/Adult_Research_Branch/Research_documents/Outcome_evaluation_Report_2013.pdf) at page 26. Another 3% of the cases involve a violation of the sex offender registry rules, such as failing to update registry information on schedule, while the remaining 7.3% of those returned to prison committed a new offense that was not a sex crime.

14. R. Karl Hanson, Andrew J. R. Harris, Leslie Helmus, and David Thornton, *High-Risk Sex Offenders May Not Be High Risk Forever*, Journal of Interpersonal Violence 2014, Vol. 29(15) 2792–2813. The median year of release was 1996; the release year ranged from 1957 to 2007.

15. See R. Karl Hanson, Alyson Lunetta, Amy Phenix, Janet Neeley, Doug Epperson, *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, Journal of Threat Assessment and Management, 2014, Vol. 1, No. 2, 102–117.

16. These figures are all taken from Table 2 of Hanson, Harris, et al, n. 14 *supra*. The high risk group was 26% of the entire sample of 7,740 offenders; the low risk group was 11.5%.

here. About 3% of felons with *no* history of sex offenses commit one within 4.5 years of their release,¹⁷ compared to 5.3% of violent sex offenders who are rearrested for a sex crime within 3 years of their release.¹⁸ So felons with no history of sex offenses do not appear on the sex offender registry after release, but the chance of their committing a sex offense is actually about the same, if not higher, than the chance of a new sex offense by the low-risk offenders one can find on any registry. Released sex offenders actually have a *lower* overall re-arrest rate, for any crime, and especially for a new felony, than do other released felons.¹⁹

And in assessing risk, there's another important thing to consider: whatever the assessment of risk at the outset, the likelihood of re-offense declines for each year after release without a new sex offense, even for offenders initially considered at the highest risk to re-offend. In the 2014 Hanson study, *none* of the offenders in the *high* risk group who was offense-free after 16 years committed a sex offense thereafter.²⁰ This point is important because most people are typically put on registries for decades, and often for life. Being offense-free for twenty years, or more, will not get them removed.²¹ Two-thirds of

17. *Id.*, describing data from Wormith, J. S., Hogg, S., & Guzzo, L. *The predictive validity of a general risk/needs assessment inventory on sexual offender recidivism and an exploration of the professional override*. Criminal Justice and Behavior, (2012), 39, 1511-1538.

18. Langan, Schmitt, and Durose, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994*, NCJ 198281 (2003), at Table 23. This was a study of 9,961 violent offenders released from state prison in 15 states, *id.* at 3.

19. *Id.* at p. 2. While 43% of released sex offenders were rearrested for some crime within three years of release, 68% of the released non-sex offenders were, and a higher proportion of them were charged with a felony (84%) than was true of the rearrested sex offenders (75%).

20. There were 126 high-risk offenders followed after 17 years who had not yet re-offended; 61 of them were followed for at least five additional years and none re-offended. *Hanson, et al.*, *supra* n. 13, at footnote 12.

21. An older paper referenced in *Smith v. Doe* is sometimes cited for the claim that sex offenders remain at high risk of re-offending for life. Robert A. Prentky, Raymond A. Knight, and Austin F.S. Lee, *Child Sexual Molestation: Research Issues*, National Institute of Justice Research Report NCJ 163390 (1997). ("Empirical research on child molesters, for instance, has shown that '[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release, but may occur as late as 20 years following release'." 538 U.S. at 105.) It is easier to see why the paper does not support this claim by examining the more complete published version of it, Robert A. Prentky, Austin E. S. Lee, Raymond A. Knight, and David Cerce, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law and Human Behavior 635 (1997). The study collects data on 136 rapists and 115 child molesters who were released from the Massachusetts Treatment Center for Sexually Dangerous Persons. The Center was established in 1959 "for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses." *Id.* at 637. There is no reason to assume that the re-offense rates for people committed to a special facility for who are particularly egregious and have committed repeated offenses would be the same as the re-offense rates for most people on the typical registry. The authors themselves observe that "[s]exual offenders sampled from general criminal populations, from offenders committed to a state hospital, and from a maximum security psychiatric hospital, are likely to differ in ways that would affect their recidivism rates and make cross-sample comparisons difficult." *Id.* at 636. Moreover, critical information

those initially classified as high risk in fact never re-offend, and while at the outset we can't tell just which of the men classified the high-risk really aren't, that is revealed over time: if they have not re-offended after ten or fifteen years, the chance of their reoffending later is very low.

This discussion of high and low risk registrants raises the question of just whom one finds on sex offender registries anyway. If people think most registrants are violent rapists and adults who molested children, they would be wrong. State laws require registration of a teenager who had consensual sex with another teenager, of people who possessed erotic images of anyone under 18 but have no history of any contact offense, and even, depending on the state, someone convicted of public urination.²² A Justice Department study concluded that more than a quarter of all sex offenders committed their offense when they were themselves a minor.²³ If the registry's main purpose is to let us monitor and warn people about those who committed violent, coercive, or exploitative contact sex offenses, we dilute its potential usefulness when we fill it up with people who never did any of those things.

Or, people who once did but are very unlikely to do so again. The respondents in *Smith* who challenged the Alaska registry were classified as "aggravated" sex offenders, required under Alaska law to register *four times a year for life*, because they had been pled *nolo contendere* in 1984 to sexual contact with minors.²⁴ They served their sentences and were released in 1990. One had completed a two-year post-release treatment program. The other had remarried after release and been granted custody of his daughter, the court having concluded he had been rehabilitated. (Psychiatric evaluations found he had "a very low risk of re-offending" and is "not a pedophile".) Neither had re-offended in the twelve years since release, a fact that alone predicts a re-offense rate below 5%.²⁵ Alaska posts the address and place of employment of all registrants "for public viewing in print or electronic form, so that it can be used by "any person" and "for any purpose." Alaska Admin. Code tit. 13, § 09.050(a) (2000)." Alaska's

necessary to understand the study is not provided. While we are told that the "study period" began in 1959 and ended in 1984, *id.* at 640, and that offenders were released at various times throughout this 25-year period, *id.* at 642, we are not told the number released in any given year nor the number followed for any given length of time. All results are reported in percentages rather than in numbers, but given the total sample size of 251, it is likely that the number of offenders followed for more than ten or fifteen years was quite small, rendering the percentage figures relatively meaningless. By contrast, the 2014 Hanson study described in the text provides complete information on the 7,740 offenders it followed.

22. Chanakya Sethi, *The Ridiculous Laws That Put People on the Sex Offender List*, http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/mapped_sex_offender_registry_laws_on_statutory_rape_public_urination_and.html.

23. David Finkelhor, Richard Ormrod, and Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin December 2009. Juveniles account for 36% of all sex offenders with juvenile victims, *id.*

24. The information in this paragraph about the offenders, and the provisions of Alaska law then in effect, is taken from the Ninth Circuit opinion that the Supreme Court reversed, *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001).

25. Hanson, Harris, et. al., n. 12 *supra*.

registry rules are milder than some. California's and Florida's registries, for example, make no distinction among sex offenses; lifetime registration is required for all. A college student convicted of public urination must register for life, as must a 14-year old who had consensual intimate contact with his 13-year old girlfriend.

Some state supreme courts have recently held that treating everyone convicted of a sex offense as a likely re-offender, when many are not, violates the constitutional guarantees of Due Process. In *J.B.*²⁶ the Pennsylvania Supreme Court considered changes to the Pennsylvania registry law that automatically placed juveniles on the offender registry for 25 years if they committed a rape or "aggravated indecent assault" when over 14.²⁷ The rationale for the registry law was the legislative finding that "Sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest." The court objected that the affected juveniles were effectively subject to an "irrebutable presumption" that they posed a high risk of re-offense even though the presumption is in fact "not universally true". Key to the court's holding was the registration's effect on the affected juveniles.

The Juveniles...maintain that registration of juvenile sexual offenders does not improve public safety, given that few juvenile sexual offenders recidivate. Instead, they contend that registration could have the opposite result because it erects obstacles for rehabilitation and impedes a child's pathway to a normal productive life through continuously reinforcing the unlikely supposition that the youth has "a high risk of committing additional sexual offenses." The Juveniles argue that children subject to registration requirements suffer various irreparable harms, including difficulty obtaining housing, employment, and schooling, and suffer resulting psychological effects which can lead to depression and personal safety risks. They contend that lifetime registration as a sex offender contradicts the underlying purpose of Pennsylvania's juvenile justice system, which emphasizes rehabilitation to allow children to become productive members of society.²⁸

The court held that because individual offenders were allowed no meaningful opportunity to show the presumption of high risk was factually wrong in their case, they were unconstitutionally denied Due Process. As the Pennsylvania Supreme Court pointed out, the state has available to it good measures of the likelihood of any individual re-offending; it has no need to employ blanket assumptions. And it ought to use such individual measures rather than relying on, and thus endorsing, global stereotypes that have no basis in fact:

26. In the Interest of J.B., 107 A.3d 1 (Pa. 2014).

27. In general, the offenses which triggered the requirement were rape and "aggravated indecent assault", or an attempt or solicitation to commit such an offense. *Id.* at 12.

28. *Id.* at 33-34.

[E]ven without [the statutory language presuming a likely re-offense], the common view of registered sexual offenders is that they are particularly dangerous and more likely to reoffend than other criminals. [citing an earlier case that said "Common sense..would lead an average person of reasonable intelligence to conclude that there is something dangerous about the registrant."] As...found by the trial court, registration also negatively affects juvenile offenders' ability to obtain housing, schooling, and employment, which in turn hinders their ability to rehabilitate. Thus, SORNA registration requirements, premised upon the presumption that all sexual offenders pose a high risk of recidivating, impinge upon juvenile offenders' fundamental right to reputation as protected under the Pennsylvania Constitution.²⁹

The California Supreme Court used different labels but a similar logic when it held this year that it was unconstitutionally irrational to automatically subject *every* sex offender parolee in San Diego to residency restrictions that impeded their rehabilitation and left many of them with no place to live.³⁰ Once again, the problem with the statute was its application to every sex offender, without regard to their individual circumstances including an individualized assessment of each offender's risk of re-offense. The court noted that parole officers have general supervisory authority over parolees that allows them to impose restrictions on their residence that are reasonably related to the particular parolee's situation. Customized restrictions logically connected to the individual offender's situation were allowed; "one size fits all" restrictions imposed on all offenders were not.

The logic of these decisions offers hope for a wider judicial rationalization of the rules on sex offender registries and the life restrictions that typically accompany them. To realize that hope, one must apply the principle adopted by both the Pennsylvania and California supreme courts to a correct understanding of the facts. The principle is that public safety policies that restrict and burden individuals cannot be based on sweeping generalizations about the risk posed by *anyone* who commits an act that puts him on a sex offender registry, when we know the risk varies across individual registrants in ways we can assess by simple actuarial measures, and also declines over time for any individual who remains offense-free, regardless of his initial risk assessment. The burdens imposed by registration and all that follows from it demand justifications based on more individualized risk assessments. That is the principle. The correct fact is that the risk level, for nearly everyone on the registry, is nowhere near the "frightening and high" rate assumed by *Smith* and *McKune* and all the later decisions that rely on them.

But while the principles endorsed by these recent opinions offers hope, the Pennsylvania opinion also illustrates the difficulty of getting courts to understand the facts well enough to apply them properly.

29. *Id.* at 42-43. The Pennsylvania Supreme Court is not alone. Two years before, the Ohio Supreme Court held that imposing lifetime registration on juveniles constituted "cruel and unusual punishment". In re C.P., 967 N.E.2d 729 (Ohio 2012). Treating required registration as punishment accurately captures its impact on the registrant, and triggers additional constitutional protections, but differs from the position taken by the U.S. Supreme Court in *Smith*.

30. In re Taylor, 60 Cal. 4th 1019, 343 P.3d 867, 184 Cal. Rptr. 3d 682 (2015).

The court held that the burdens of registration on juveniles could not be justified because of their lower re-offense rate: “While adult sexual offenders have a high likelihood of reoffense, juvenile sexual offenders exhibit low levels of recidivism (between 2-7%), which are indistinguishable from the recidivism rates for non-sexual juvenile offenders, who are not subject to SORNA registration.”³¹ But one can see that the court’s comparison was infected by the very same error it condemned when it compares juveniles to *all* adults, making no distinction among adult registrants. The Hanson study shows that the likelihood of re-offense for *most* adults on the registry is within the same 2-7% range the court attributes to juveniles.³² And of course, the re-offense rate then declines, for all registrants, with each year after release that they remain offense-free. Any state that routinely imposes 25-year registration requirements on adult offenders has a registry full of people who have gone ten or more years with no new offense, for whom the average likelihood of re-offense is well below 7%. The problem is worse in states like California and Florida that put all offenders on the registry for *life*.

Writing on a different subject entirely, Eula Biss recently observed:

Risk perception may not be about quantifiable risk so much as it is about immeasurable fear. Our fears are informed by history and economics, by social power and stigma, by myth and nightmares. And as with other strongly held beliefs, our fears are dear to us. When we encounter information that contradicts our beliefs, we tend to doubt the information, not ourselves.³³

The label “sex offender” triggers fear, and disgust as well. Both responses breed beliefs that do not yield easily to facts. That’s why even those politicians now urging criminal justice reforms conspicuously omit mentioning sex offenses when they argue for less punitive policies that would facilitate the offenders’ reintegration into civil society.³⁴ Unfortunately, the Supreme Court has fed the fear. It’s become the “go to” source that courts and politicians rely upon for “facts” about sex offender recidivism rates that aren’t true. Its endorsement has transformed random opinions by self-interested nonexperts into definitive studies offered to justify law and policy, while real studies by real scientists go unnoticed. The Court’s casual approach to the facts of sex offender re-offense rates is far more frightening than the rates themselves, and it’s high time for correction. Perhaps there’s now hope it may soon happen.

31. 107 A.3d at 17.

32. Examining the sources the Pennsylvania court relies on for the juvenile rate of 4 to 7 percent shows that is a 5-year re-offense rate. Table 2 of the Hanson study shows a 5-year re-offense rate of 2.2% for low-risk sex offenders, and a 6.7% 5-year rate for moderate risk offenders. These two groups together account for 74.2% of Hanson’s sample of 7,740 offenders.

33. Eula Biss, *On Immunity: An Inoculation* (2014), as quoted in Jerome Goopman, *There’s No Way Out of It!*, New York Review of Books, March 5, 2015. Biss (and Goopman) were writing about parents’ irrational fears of inoculating their children.

34. See Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, New York Times, February 19, 2015 at p. A1.